Nos. 79-1252 and 79-1502

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA, *et al.*,
Petitioners,

v.

SIERRA CLUB, *et al.*,
Respondents.

KERN COUNTY WATER AGENCY, *et al.*,
Petitioners,

v.

SIERRA CLUB, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE NATIONAL WILDLIFE FEDERATION AND FOR OPERATION WILDLIFE, AS *AMICI CURIAE*, URGING AFFIRMANCE

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BRIEF FOR THE NATIONAL WILDLIFE FEDERATION AND FOR OPERATION WILDLIFE, AS *AMICI CURIAE*, URGING AFFIRMANCE

INTEREST OF AMICI

The National Wildlife Federation (NWF), the country's largest non-governmental conservation organization, is dedicated to the wise use and management of the country's natural resources. Operation Wildlife (formerly California Natural Resources Federation) is a non-profit, tax-exempt citizens conservation group affiliated with the NWF with some 1,500 members throughout California. It is committed to generating public interest in wildlife and improving conservation education through organized school programs and informal public education projects. The members of NWF and Operation Wildlife are espe-

cially interested in the protection of our nation's water resources and thus have a compelling interest in the availability of private actions to require thorough federal review of water diversion projects under the Rivers and Harbors Act of 1899, and the scope of Section 10 of that Act, both at issue in this litigation.

CONSENT OF THE PARTIES

Amici are filing this brief with the consent of all parties, whose letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

California's Delta pumping plant, which has been operating since 1967, is an integral component of one of the largest water diversion projects in history. The pumping plant alone has the capacity to remove from the Sacramento-San Joaquin Delta millions of acre-feet of water each year.

The federal government now concedes that this massive redistribution of water from a navigable channel is prohibited by Section 10 of the Rivers and Harbors Act of 1899 ("1899 Act"), 33 U.S.C. § 403, unless approved by the U.S. Army Corps of Engineers ("Corps"). Yet, for thirteen years the federal government has done nothing to remedy this conspicuous violation of the law. Because no enforcement action was forthcoming from the Department of Justice, it was necessary for private parties to initiate this lawsuit seeking to enjoin the violation pending review by the Corps in order to protect their interests under the 1899 Act and subsequent legislation.

Amici NWF and Operation Wildlife urge affirmance of the Circuit Court's holding that Congress intended to afford a private cause of action in the 1899 Act. Congress' intent is best evidenced by the circumstances of the statute's enactment, for the Act was passed in direct response to a case denying private plaintiffs a cause of action in federal court. Given the prevailing common law doctrine of public nuisance, Congress justifiably pre-

sumed and intended the Act's prohibitory language would create, without more, a private cause of action for citizens injured by violations. The legislative history makes clear that Congress intended the 1899 Act's criminal sanctions to supplement rather than supplant these implicit private remedies. Finally, Congress must have intended to afford a private right of action, since that right of action is essential to the legislative goal of prompt, effective enforcement against all violators, including the federal government itself.

Amici NWF and Operation Wildlife also urge affirmance of the Circuit Court's conclusion that Section 10 requires Corps approval of the Delta pumping plant. Contrary to the assertions of petitioners State of California, et al. ("California") and petitioners Public Water Agencies ("Water Agencies"), Congress intended no exemption of state water allocation projects from the provisions of the 1899 Act. This Court has previously found Section 10 to be fully applicable to state activities affecting navigable waterways. Congress possesses and has exercised in the 1899 Act its broad authority to preserve and protect the nation's waterways, and it has declared in unmistakable terms that *any* activity that significantly impacts a federal waterway must receive prior federal approval. California's activities, which entail the annual diversion of millions of acre-feet of water from the Delta and result in lowered water levels and reversals in directional flow, are clearly subject to the provisions of Section 10.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY HELD THAT PRIVATE CITIZENS INJURED BY VIOLATIONS OF THE RIVERS AND HARBORS ACT OF 1899 MAY SUE TO ENJOIN THOSE VIOLATIONS PENDING ADMINISTRATIVE REVIEW.

This Court has previously held that the rights and remedies which Congress intended under the 1899 Act extend beyond those explicitly enumerated. *Wyandotte*

Transp. Co. v. *United States*, 389 U.S. 191 (1967); *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960). The first issue in this case is whether Congress could have intended the broad panoply of implied rights recognized in *Wyandotte* and *Republic Steel*, but meant to deny the limited cause of action sought here.[1]

As the Court recently confirmed in *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979), the starting point for ascertaining the existence of an implied right of action is the analysis set forth in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). Recent cases have stressed that the central inquiry remains whether Congress intended to create a private right of action, and that the four *Cort* v. *Ash* factors should be viewed as the "criteria through which this intent could be discerned." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 16-17, 24 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568, 575-576 (1979); *Davis* v. *Passman*, 442 U.S. 228, 241 (1979).

The excellent opinions below ably demonstrate that each of the *Cort* v. *Ash* factors are amply satisfied in the instant case. Rather than duplicate that analysis here, Amici will focus on two fundamental aspects of the 1899 Act which best evidence Congress' intent to create a private right of action. First, a close examination of the historical context of the 1899 Act and its predecessors reveals a congressional presumption and intention that the 1899 Act would afford a private right of action.[2]

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[1] The precise implied cause of action asserted here is a narrow one. Respondents Sierra Club, et al. have asserted, and the lower courts have found, only a cause of action to enjoin violations of the Act pending the prescribed administrative review by the Army Corps of Engineers. As in Allen v. State Bd. of Elections, 393 U.S. 544, 555 n.19, 556 (1969), "[i]t is important to distinguish" cases brought to invoke administrative procedures from cases brought to litigate the substantive questions concerning permit approval.

[2] There is, of course, no express statement of congressional intent in the Act. Had Congress expressly granted or denied a private action, discerning an implication would be unnecessary. The

Second, Congress must have intended a private action since, as this case demonstrates, the government is inherently incapable of enforcing the Act against itself and lacks the resources to enforce it effectively against others.

A. The Circumstances of Enactment, Legal Context and Legislative History All Evidence Congress' Intent to Create a Private Right of Action.

1. *The Act Was a Legislative Reversal of the Result Reached in the* Willamette Bridge *Case.*

Congress' intention to safeguard the interests of private parties injured by obstructions to navigation is well evidenced by the circumstances surrounding the enactment of the Rivers and Harbors Act of 1890 (the "1890 Act"), the predecessor to the 1899 Act. The 1890 Act was a direct response to this Court's decision in *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1 (1887) and a legislative reversal of the result reached there.

In *Willamette*, plaintiffs Hatch and Lownsdale sued in federal court to enjoin the construction of a bridge which they contended would block the passage of their boats and would generally obstruct the navigation of the river. *Id.* at 3-4. The lower court held that the case was one arising under the laws of the United States and found for the plaintiffs. The Supreme Court reversed, concluding that there was no federal statute regulating the bridge in question and thus there was no federal jurisdiction. "There must a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the States." *Id.* at 8.[3]

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legislative history is "equally silent or ambiguous." Cannon v. University of Chicago, *supra*, 441 U.S. at 694. This circumstance is neither surprising nor determinative. Transamerica Mortgage Advisors, Inc. v. Lewis, *supra*, 444 U.S. at 18.

[3] The Court noted in passing that there is no federal common law of nuisance, 125 U.S. at 8, but this comment was intended to

Congress acted quickly to provide such a statute. In successive sessions of Congress in 1887 and in 1889, the lawyer who had represented the plaintiff in *Willamette*, Senator J. N. Dolph of Oregon, introduced legislation to supply the federal statute necessary to give federal courts jurisdiction over cases involving obstruction of navigable waterways.[4] These earlier bills culminated in the 1890 Act, and later the 1899 Act. *See United States* v. *Republic Steel Corp.*, *supra*, 362 U.S. at 499-504 (Harlan, J., dissenting).

The 1890 Act's legislative history leaves no doubt that the law constituted a direct response to plaintiff Hatch's failure to obtain relief in federal court. The Senate debate preceding the passage of the 1890 Act contains numerous references to the *Willamette* case. *See* 21 CONG. REC. 8605-07 (1890). Senator Dolph expressly referred to his representation of Hatch in *Willamette* and urged Congress to pass legislation which would alter the results of that case. *Id.* at 8607. Congress clearly intended the 1890 Act to provide what the *Willamette* case denied: access to a federal court, and ultimately, to a federal decision-maker,[5] for private plaintiffs seeking to chal-

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mean only that there was no federal common law of nuisance which would confer "arising under" jurisdiction. The Court cannot have meant that there was no federal common law to apply once the parties were properly in federal court. Under Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) a court was free to apply federal common law of nuisance to claims brought in federal court, and the federal courts had been applying federal common law of nuisance for many years. *See, e.g.*, Railroad Co. v. Mississippi, 102 U.S. 135 (1880); Pennsylvania Ry. Co. v. Baltimore & N.Y. Ry. Co., 37 F. 129 (S.D. N.Y. 1888); Missouri River Packet Co. v. Hannibal & St. Joseph R.R. Co., 2 F. 285 (W.D. Mo. 1880).

[4] Justice Harlan traced Senator Dolph's efforts and the "tortuous" legislative history of the 1899 Act in his dissent in United States v. Republic Steel Corp., *supra*, 362 U.S. at 493, 499-504.

[5] The 1890 Act vested final authority to determine the validity of an obstruction in the Secretary of War rather than the federal circuit courts. 26 Stat. 426, 454. Under the statutory scheme, the Secretary of War was the final decision-maker concerning the rea-

lenge obstructions to navigable waterways that harm important public and private interests.

2. *Given the Prevailing Common Law Doctrine of of Public Nuisance, Congress Assumed and Intended that the Act Would Create a Private Right of Action.*

An evaluation of the congressional response to the *Willamette* case requires an analysis of the legal context in which the legislature worked. *See Cannon* v. *University of Chicago, supra*, 421 U.S. at 698-699. In 1890, congressional assumptions concerning the law of obstructions were based on the prevailing common law doctrine of public nuisance. Against this background, the solution to the problem created by *Willamette* was clear: a statute asserting the missing federal jurisdiction over navigable waterways and forbidding unauthorized obstructions which would, without more, create a private right of action in favor of plaintiffs like Hatch.

The law of public nuisance was well settled by 1890. In 1838, this Court explicitly adopted the long established English position [6] and held that although a public nuisance is the subject of criminal jurisdiction and the "ordinary and regular proceeding at law is by indictment or information," there is a private cause of action for people who sustain special damage due to the erection of an obstruction. *City of Georgetown* v. *Alexandria Canal Co.*,

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sonableness of an obstruction; the role of the federal courts was to enjoin construction at the behest of private parties or the Department of Justice until the Secretary of War had acted on the permit application.

[6] Since the middle ages, the obstruction of public passages had been considered a public nuisance punishable by the sovereign as a crime. *See* Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 998-999 (1966). Although English courts initially held that private citizens injured by such obstructions had no right to sue, this position was repudiated centuries ago and by 1536 the courts had implied a private right of action based on the criminal offense. *See id.* at 1005.

37 U.S. (12 Pet.) 91, 97-99 (1838).[7] Following *City of Georgetown*, the federal courts repeatedly reaffirmed the availability of a private cause of action for persons injured by unlawful obstructions in navigable waterways.[8] Moreover, the federal courts traditionally looked to congressional enactments to determine if a structure was unlawful.[9] If the structure did not meet the conditions imposed by Congress, it was unlawful and a public nuisance. "It is sufficient to say that if the structure is not according to the limitations of the act of congress it is so far unauthorized, and the defendant is, therefore, liable for any injury to the plaintiff's vessel which was caused, or contributed to, by the unlawful structure." *Missouri River Packet Co.* v. *Hannibal & St. Joseph R.R. Co.*, 2 F. 285, 291 (W.D. Mo. 1880).

Thus, at the time of the 1890 Act it was well established that an obstruction which failed to conform to the restrictions imposed by Congress was actionable by private plaintiffs. Congress must have assumed that the same result would flow from the 1890 Act, for the concept of an illegal obstruction was inextricably intertwined

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[7] The reason for permitting private rights of action even where the government has enforcement authority was succinctly stated by Chief Justice Park in Wheller v. Bedford, 54 Conn. 244, 249 (1886): "But suppose the authorities are unwilling to institute proceedings. Where then will be the ample remedy? They are not bound to redress the plaintiff's private grievances."

[8] *See e.g.*, Railroad Co. v. Mississippi, 102 U.S. 135 (1880); Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 564 (1851); Texarkana & Ft. S. Ry. Co. v. Parsons, 74 F. 408 (8th Cir. 1896); Pennsylvania Ry. Co. v. Baltimore & N.Y. Ry. Co., 37 F. 129 (S.D.N.Y. 1888); Missouri River Packet Co. v. Hannibal & St. Joseph R.R. Co., 2 F. 285 (W.D. Mo. 1880). *See* Smith, *Private Action for Obstruction to Public Right of Passage*, 15 COLUM. L. REV. 1, 16 (1915).

[9] At least as early as 1880 it was established that federal courts had jurisdiction in cases by private plaintiffs challenging obstructions to navigable waterways where an evaluation of the lawfulness of the structure required an interpretation of federal law. *See* Railroad Co. v. Mississippi, 102 U.S. 135 (1880).

with a private right of action for persons injured by such obstruction.[10]

An analogous meshing of common law and statutory standards was addressed in *Transamerica Mortgage Advisor, Inc.* v. *Lewis, supra*, 444 U.S. at 18-19 in which this Court implied a private cause of action under section 215 of the Investment Advisors Act of 1940 for rescission of contracts declared "void" in that act. The Court held that when Congress declared certain contracts void, "it intended that the customary legal incidents of voidness would follow." *Id.* at 19. In this case Congress similarly must have intended the customary legal incidents of declaring an obstruction illegal.[11]

Any doubts concerning judicial implication of a private right of action that existed when the 1890 Act was passed were removed prior to the 1899 Act by interven-

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[10] The vitality of the common law nuisance doctrine continues today. Illinois v. City of Milwaukee, 406 U.S. 91 (1971). Indeed, the federal government, while arguing against a limited private right of action in this case, has elsewhere conceded a private right to invoke the federal common law of nuisance in federal court. Middlesex County Sewage Authority v. National Sea Clammers Assoc., *cert. granted*, Nos. 79-1711, 1754, 1760 (Oct. 21, 1980), Brief for Federal Respondents on Petition for Writ of Certiorari at 6-7. Arguably, this doctrine provides an alternative rationale for upholding the decision below, but the Court need not go so far. Amici contend only that Congress was aware injured citizens would be able to invoke the 1899 Act in nuisance actions seeking broad equitable and legal relief and must have intended that the lesser included statutory action for injunction pending administrative review be available as well.

[11] In *Transamerica*, the Court rejected the suggestion that Congress intended claims under § 215 to be raised only in state court, stating, "we decine to adopt such an anomalous construction without some indication that Congress in fact wished to remit the litigation of a federal right to the state courts." 444 U.S. at 19 n.8. It would be even more anomalous in this case to conclude that Congress intended private parties suing under the Rivers and Harbors Act to be limited to state court since the 1890 Act was intended to supply the federal jurisdiction found lacking in *Willamette*.

ing federal court decisions. During the period from 1890 to 1899, at least two federal courts permitted private parties to recover damages because of violations of the Act. *See Texarkana & Ft. S. Ry. Co.* v. *Parsons*, 74 F. 408 (8th Cir. 1896); *Piscataqua Nav. Co.* v. *New York, N. H. & H. R. Co.*, 89 F. 362 (D. Mass. 1898).[12] As it is "always appropriate to assume that our elected representatives, like other citizens, know the law . . .," *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 696-697, Congress' decision to reenact the statute in 1899 without negating the results reached in those cases can only be viewed as an endorsement of those interpretations.

Certainly, this was the view of the federal courts best positioned to understand Congress' intent. In a line of cases beginning in 1901, federal courts explicitly found a private right of action under the Act. *See, e.g., Neches Canal Co.* v. *Miller & Vidor Lumber Co.*, 24 F.2d 763 (5th Cir. 1928); *Carver* v. *San Pedro, L.A. & S.L.R. Co.*, 151 F. 334 (S.D. Ca. 1906); *E.A. Chatfield Co.* v. *City of New Haven*, 110 F. 788 (D. Conn. 1901). In addition, this Court reached the merits in several Section 10 cases, apparently assuming the existence of a private right of action. *See Wisconsin* v. *Illinois*, 278 U.S. 367 (1929); *Cummings* v. *Chicago*, 188 U.S. 410 (1903).

Viewed from the perspective of the prevailing legal context, Congress' response to the *Willamette* case is unambiguous. As this Court explained in *United States* v. *Republic Steel Corp.*, *supra*, 362 U.S. at 492:

> The void which was left by *Willamette Iron Bridge Co.* v. *Hatch*, *supra*, need not be filled by detailed codes which provide for every contingency. Congress has legislated and made its purpose clear; it has

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[12] Though an admiralty case, *Piscataqua* has been recognized as one of the leading decisions permitting a private right of action for persons injured by unlawful obstructions. *See* Smith, *Private Action for Obstruction to Public Right of Passage*, 15 COLUM. L. REV. 1, 145 (1915). *See also* Kirwin v. Mexican Petroleum Co., 267 F. 460, 462 (D.R.I. 1920).

> provided enough federal law in § 10 from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation.

Congress' willingness to fashion rights and remedies that "rest on inferences" undoubtedly complicates this Court's role of discerning legislative intent, but it does not justify frustrating that intent. It is as much "judicial legislation" to deny a private right of action which Congress intended as to improvise one that Congress never had in mind.

3. *The Legislative History Confirms that Congress Intended to Augment, Not Supplant, the Right of Enforcement by Private Citizens Which It Assumed Would Be Implied Under the Prevailing Common Law Doctrine.*

Congress included a provision for federal enforcement in order to ensure that the Act would in fact be enforced. Contrary to the suggestion of the Federal Respondents, the concern was not that private plaintiffs would complicate or impede enforcement. Rather the congressional debates evidence a fear that there would not be enough "public-spirited" plaintiffs like Hatch to enforce compliance.

This concern was specifically addressed by Senator Vest of Missouri, Chairman of the Subcommittee on Bridges of the Commerce Committee. Noting that "hundreds of bridges are constructed yearly in the United States, without any permission from Congress, over navigable streams under the jurisdiction of the Government," the Senator expressed doubt that private citizens had the financial resources to provide *all* of the enforcement needed. 21 CONG. REC. 8603 (1890). The Senator warned that if the Secretary of War were not given the power to enforce the Act, the only means to remove an obstruction would be for private individuals to initiate judicial proceedings "to condemn the bridge as a nuisance." *Id.*

The overriding legislative concern was that the Act be effectively enforced. Congress responded to this concern by enlisting the *additional* enforcement resources of the Department of Justice, not by eliminating the private enforcement resources which already existed.[13]

B. Private Rights of Action Are Essential to the Effective Enforcement of the Act.

Where, as here, a private right of action is essential to the accomplishment of the legislative purpose, "the Court is decidedly receptive to its implication under the statute." *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 703.[14] This rule provides strong support for the private right asserted here, for "[t]he inadequacy of the criminal penalties explicitly provided by § 16 of the Rivers and Harbors Act is beyond dispute." *Wyandotte Transp. Co.* v. *United States*, *supra*, 389 U.S. at 202.

1. *A Private Right of Action Is the Only Effective Check on Federal Violations of the Act.*

It is uncontested that the 1899 Act applies to federal agencies. The Act is unqualified in scope, and both the Corps of Engineers and Congress have recognized that federal projects are subject to the Act. *See* 33 C.F.R. § 322.3(1); *The Nation's Estuaries: San Francisco Bay and Delta, Calif. (Part 1): Hearings Before the House Comm. on Gov't. Operations*, 91st Cong., 1st Sess. 125 (1969).

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[13] Federal Respondents suggest that the elimination from one of the early bills of a provision which would have permitted private enforcement of penal sanctions, evidences an intent to vest exclusive enforcement in the Department of Justice. However, private enforcement of penal provisions, or *qui tam* actions, and private civil causes of action are two wholly separate issues and there is nothing in the legislative history which suggest that by eliminating the former, Congress meant *sub silentio* to affect the latter. *See* Sierra Club v. Andrus, 610 F.2d 581, 588 n.9 (9th Cir. 1979).

[14] *Accord*, Allen v. State Bd. of Elections, *supra*, 393 U.S. at 556; Wyandotte Transp. Co. v. United States, *supra*, 389 U.S. at 202.

In 1890, the federal government was itself a major builder of obstructions in navigable waterways. *See Water Pollution Control Legislation—1971 (Oversight of Existing Program): Hearings Before House Comm. on Public Works*, 92nd Cong. 1st Sess. 286 (1971). Although much of the building was done by the Corps, significant amounts were done by other government agencies. *See, e.g.*, Act of June 10, 1872, Ch. 415, 73 Stat. 347, 368. Today, federal involvement in the building of obstructions has reached enormous proportions. *See The Nations Estuaries: San Francisco Bay and Delta, Calif. (Part 2): Hearings Before the House Comm. Gov't Operations*, 91st Cong., 1st Sess. 17, 18, 24 (1969) (listing the numerous federal agencies which engage in projects affecting navigable waters).

As the legislative history demonstrates, the Act was designed to insure that *all* projects affecting navigable waterways would be subject to review by one knowledgeable decisionmaker applying a uniform federal policy. *See, e.g.*, 21 CONG. REC. 8602-03 (1890) (remarks of Sen. Gray). This objective requires effective enforcement of the Act against *all* violators, including federal violators. Congress could not have expected the Department of Justice conscientiously to pursue enforcement actions against federal agencies where the Department must also defend those agencies once prosecution is brought. *See Illinois ex rel. Scott* v. *Hoffman*, 425 F. Supp. 71, 76 (S.D. Ill. 1977) (United States Attorney represents the defendant and "is thus in no position to enforce the Act"); *Miller* v. *Mallery*, 410 F. Supp. 1283, 1289 (D. Or. 1976) (where government is both enforcer and alleged violator of an act, rejection of implied private action would eviscerate the act); *Natural Resources Defense Council, Inc.* v. *Grant*, 355 F. Supp. 280, 290 (E.D.N.C. 1973) (Attorney General represents agency and is thus in no position to enforce the act). Unless private plaintiffs are permitted to enforce this Act against federal violators, there will be no enforcement

against an entire group of violators and the goal of achieving a uniform federal policy will be substantially undercut.

2. *The Federal Government Has Proven Unwilling or Unable to Provide the Level of Enforcement Necessary to Implement the Congressional Intent.*

As this case demonstrates, the federal government has proved either unwilling or unable to meet its enforcement obligations under the Act. The water project at issue here constitutes one of the largest diversions of a major waterway in the history of the country. Yet, thirteen years after the Delta pumping plant was constructed, the Department of Justice has taken no action to demand the permit application it now admits is required.

Recent testimony before Congress by Justice Department officials suggests that failure to enforce the Act may be the rule rather than the exception. In response to repeated criticism by Congress of the lack of vigorous enforcement, *see* HOUSE COMM. ON GOV'T. OPERATIONS, INCREASING PROTECTION FOR OUR WATERS, WETLANDS AND SHORELINES: THE CORPS OF ENGINEERS, H. R. REP. 1323, 92nd Cong., 2d Sess. 23-26 (1972); HOUSE COMM. ON GOV'T OPERATIONS, ENFORCEMENT OF THE REFUSE ACT OF 1899, H. R. REP. 1333, 92nd Cong., 2d Sess. 6-22 (1972), Justice Department officials frankly acknowledged that they lacked adequate resources to fully enforce the Act. *See id.* at 16.[15]

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[15] This lack of resources is particularly critical here since the only effective enforcement is *prompt* enforcement. Once substantial work on the project has occurred, it may be economically infeasible to order total restoration. *See, e.g.*, United States v. Sexton Cove Estates, Inc., 526 F.2d 1293 (5th Cir. 1976); United States v. Sunset Cove, Inc., 514 F.2d 1089 (9th Cir.) *cert. denied*, 423 U.S. 865 (1975). Moreover, as an Assistant Secretary of the Interior has explained, it is extremely difficult to evaluate completed work because "the work accomplished often has already destroyed any values which we seek to preserve." H.R. REP. No. 1323, 92d Cong., 2d Sess. 22 (1972). Finally, the further a project has progressed,

Senator Vest may have been correct that private resources alone are not sufficient to guarantee full and expeditious compliance with the Act. 21 CONG. REC. 8603 (1890). But, as this case demonstrates, actions by private parties constitute an effective means of blocking some of the most egregious violations of the statute. Given the reality of non-enforcement by the government and the overriding congressional intent to ensure compliance, the conclusion must be that private plaintiffs can sue to enforce this Act.

3. *A Private Right of Action Will Not Circumvent The Intended Agency Review, But Will Ensure that the Intended Agency Review Will Occur.*

Congress established the Corps as a licensing agency in order to ensure a consistent federal policy made by one body with technical expertise. The Corps was selected because it "controls all the means of informing itself about the physical conditions that surround the proposed structure and has at its command every avenue of information that will throw light upon the question which is to be decided." 21 CONG. REC. 8604 (1890) (remarks of Sen. Gray). The permit process augments this expertise by providing an opportunity for public hearings and comment, *see* 33 C.F.R. § 327.1-327.11, as well as procedures for ensuring the input of other federal agencies with expertise. *See e.g.*, Memorandum of Understanding Between the Secretary of the Interior and the Secretary of the Army, *reprinted in* 33 C.F.R. § 322 Appendix B at 693.

These carefully designed procedures simply never occurred in this case. In discussing before Congress the very water diversion project which is at issue here, the

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the more likely it is that innocent third parties will have purchased property and will be damaged if restoration is required. *See Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before Senate Comm. on Pub. Works*, 94th Cong., 2d Sess. 113-114 (1976).

Corps conceded that the decision not to require a permit was not based on any independent Corps analysis of the project, but on representations made by the Bureau of Reclamation, one of the potential violators of the Act. *See The Nation's Estuaries: San Francisco Bay and Delta, Calif. (Part 1): Hearings Before House Comm. on Government Operations*, 91st Cong., 1st Sess. 101 (1969). The Corps' acquiescence had the same practical effect as granting an unlimited permit; but, unlike the permit process, this "decision" was made without opportunity for public comment, without input from other agencies, and without an environmental impact statement.[16] The result is that either the Corps or the Justice Department or both have, through a cursory, informal, non-public, non-reviewable process, issued a permit by simply taking no action. As one Congressman aptly described the Corps' handling of the water diversion project at issue here: "there is no way of knowing whether it [the Corps' enforcement decision] has been done arbitrarily or capriciously in any instance because nobody has ever sought a permit, nobody has ever examined what is being done." *Id.* at 103.

A private right of action in this case will not circumvent the intended agency review, but rather will ensure that the intended agency review occurs. Thus, unlike *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975) and *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 953 (1974), a private right here is entirely consistent with the legislative scheme. *See Cort* v. *Ash*, *supra*, 422 U.S. at 78.

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[16] The critical importance of these procedures in the environmental enforcement scheme distinguishes the 1899 Act from those securities statutes which this Court has held do not include an implied right of action. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, *supra*; Touche Ross & Co. v. Redington, *supra*; Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977). For example, the National Environmental Policy Act of 1969 specifically recognizes the importance of the participation of "private organizations," 42 U.S.C. § 4331(a), and mandates that all federal laws be interpreted in accordance with the policies of that Act. *Id.* at § 4332(1).

In sum, both Congress and the courts understood the 1899 Act as an effort to fill "the void which was left by *Willamette Iron Bridge Co.* v. *Hatch.*" *United States* v. *Republic Steel Corp., supra,* 326 U.S. at 492. This Court should not reopen that void by denying the limited private right of action sustained below. As the private action is essential to effectuating the legislative intent, denying the right would "impute to Congress a futility inconsistent with the grand design of this legislation." *Id.*

II. THE CIRCUIT COURT CORRECTLY HELD THAT THE CORPS' JURISDICTION UNDER SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899 EXTENDS TO ALL ACTIVITIES WHICH MODIFY OR ALTER THE CONDITION OR CAPACITY OF A NAVIGABLE STREAM.

The second issue presented in this case is whether in the 1899 Act Congress exercised its admitted authority over navigable waterways to require a Corps permit for massive water diversions caused by a state-authorized facility.[17] This Court should reject petitioners' plea that a broad exemption for state projects be read into the 1899 Act which was intended by Congress to assure federal protection over all navigable waters no matter what the source of the threat to the nation's waterways. The Circuit Court properly found that the massive diversions of water caused by the Delta pumping plant which have lowered water levels and caused reversals in directional flow in the Delta, constitute an alteration or modification of the condition or capacity of a navigable waterway

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[17] It is not disputed that Congress has the constitutional *power* to regulate state water allocation projects which affect navigable waters. The obvious existence of that power is conceded by petitioners. California Brief at 13; Water Agency Brief at 37. This Court has previously found that navigable waters are properly subject to national planning and control pursuant to the broad federal commerce power and that this control extends to a broad range of federal interests in addition to navigation. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 426-427 (1940).

which require a Corps permit under clause three of Section 10 of the 1899 Act.

A. The Plain Words of Section 10 Require Corps Approval of the Delta Pumping Plant.

Section 10 of the 1899 Act consists of three separate clauses. The first clause prohibits the creation of an "unreasonable" obstruction to the navigable capacity of a federal waterway unless affirmatively authorized by Congress. *Wisconsin* v. *Illinois*, *supra*, 278 U.S. at 412-413. The second and third clauses prohibit certain enumerated structures and activities in navigable waters which Congress determined posed a sufficient threat to the nation's waterways so that prior federal approval would be required. Thus, as the Circuit Court below held:

> When one undertakes any of the activities described in clause 2 or by his activities brings about any of the results specified in clause 3, he violates section 10 if he has not first sought and obtained a permit from the Corps of Engineers.

610 F.2d at 595.

Clause three provides in relevant part:

> [I]t shall not be lawful . . . in *any* manner to alter or modify the course, location, condition, or capacity . . . of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. § 403 (emphasis added). The Circuit Court correctly applied this statute to the Delta pumping facility since by its terms clause three applies without regard to the identity of the party creating the alteration or modification. 610 F.2d at 599. While inviting this Court to read a special exemption for state water projects into the 1899 Act, petitioners impliedly concede, as they must, that the 1899 Act itself nowhere exempts state water projects from the broad jurisdiction given the

Corps over the nation's waterways. California Brief at 41. Moreover, petitioners do not and cannot contend that the literal terms of Section 10 are ambiguous.[18] In these circumstances, this Court should not read an exemption for state water projects into the clear language of Section 10. *Corona Coal Co.* v. *United States*, 263 U.S. 537, 540 (1924). *See also Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 184 n.29 (1978).

B. The Legislative History of the 1899 Act Demonstrates that Section 10 Applies to the Delta Pumping Plant.

While this Court need not look beyond the plain words of Section 10, should it do so the legislative history of the 1890 and 1899 Acts confirms that Congress did not contemplate the exemption of state water projects suggested by petitioners. In fact, there are repeated references in the debates preceding passage of the 1890 Act to the applicability of Section 10 to state-authorized projects. *See, e.g.*, 21 CONG. REC. 8604 (1890) (remarks of Sen. Gray). There is not a single reference in the legislative history of Section 10 to a special exemption for state water projects. Rather, the legislative history of the 1890 and 1899 Acts shows clearly that Congress determined that centralized control and protection of the national waterways was properly a federal concern, and that the Corps, by virtue of its demonstrated expertise respecting navigable waters, was the appropriate guardian of these precious national resources. *Id.* at 8602-04.

Petitioners' exemption theory also ignores the history of Section 10 and the language of Section 9, 33 U.S.C.

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[18] This Court has recently noted that broad general language is not ambiguous where the congressional objectives to be served require broad terms. Diamond v. Chakrabarty, 100 S. Ct. 2204, 2211 (1980). In § 10, Congress set forth the types of effects on navigable waterways it intended to regulate in broad terms which are both understandable and necessary since Congress in 1899 was in no position to enumerate in detail the infinite variety of structures or activities that could adversely affect the nation's waterways.

§ 401. Under Section 10 of the 1890 Act, the federal government could not remove an existing obstruction to navigation if it had been affirmatively authorized by a state legislature. *See United States* v. *Bellingham Bay Boom Co.*, 176 U.S. 211, 214-215 (1900). Section 10 of the 1890 Act allowing obstructions to navigation "affirmatively authorized by law" was changed by Congress in Section 10 of the 1899 Act, however, to require affirmative authorization "by Congress." Congress' decision in 1899 to reserve to itself this power to exempt certain projects from federal review shows plainly that the Delta plant is not exempt from Corps review merely because it is part of a larger project approved by the California legislature. *See Wisconsin* v. *Illinois*, *supra*, 278 U.S. at 412.

Section 9 of the 1899 Act, enacted simultaneously with Section 10, generally prohibits the erection of bridges or dams across navigable waterways without congressional approval. As to navigable rivers that lie wholly within a single state, however, erection of such structures can be authorized by the state legislature without the approval of Congress, but only if the location and plans for the structure are submitted to and approved by the Corps before construction begins. Thus, even this express recognition of state authority over navigable but intrastate waters in the 1899 Act was qualified by Congress' desire that ultimate responsibility for the protection of all navigable waters reside with the Corps.

Having found no support for their exemption theory in either the language or legislative history of the 1899 Act, petitioners rely almost entirely upon a supposed congressional "policy," as expressed in 38 different statutes, of deference to state water rights law. In these 38 statutes, however, Congress deferred to state law in explicit terms, while in the 1899 Rivers and Harbors Act Congress did not do so, but instead expressly asserted the supreme authority of Congress and the Corps over all activities affecting the nation's waterways, as shown *supra*.

Moreover, this Court should not conclude that an express congressional policy of deference to state law in one context carries an implication of a similar intent in a vastly different context. *See Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 402-403 n.16 (1970). In Section 10 of the 1899 Act the United States is acting as a sovereign in exercising its broad authority over all national waterways. By contrast, the 38 statutes cited by petitioners deal primarily with situations in which the United States is a *local user* of water within a state's boundaries for purposes of land management or reclamation. These 38 statutes merely allow state officials to allocate scarce water resources among various users on an equitable basis under state law, unhindered by federal claims of a superior entitlement to the water supplies by virtue of the United States' sovereignty. Thus, Congress' deference to state water rights law in these 38 statutes is no basis for reading a broad exemption for state water projects into the 1899 Act where the United States is not acting as a local water user,[19] but rather as a sovereign [20] in protecting the nation's waterways from

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[19] Even the cases relied on by petitioners support this distinction between the Corps' role as protector of the nation's waterways and the role of other federal agencies as users of water. In California v. United States, 438 U.S. 645 (1978), for example, § 8 of the Reclamation Act of 1902, 43 U.S.C. §§ 372, 383, was held to require that the U.S. Bureau of Reclamation seek a permit from the California State Water Resources Control Board prior to impounding 2.4 million acre-feet of water for a federal reclamation project, in part because the legislative history of the Reclamation Act of 1902 equated the rights of the United States as an owner of public lands with those of an individual, both of which were subordinate to the sovereignty of the state. 438 U.S. at 670 n.23. The effect of § 8 of the Reclamation Act of 1902 and similar deferrals to state law found in the other statutes cited by petitioners was to relegate the federal government to the status of a private landowner—a position clearly distinguishable from the unquestioned supremacy of the United States' authority through the Corps over navigable waters.

[20] *See* Sanitary Dist. of Chicago v. United States, 266 U.S. 405, 425-426 (1925).

all parties including states who, by virtue of their superior economic resources, are uniquely capable of undertaking activities on a large enough scale to affect federal concerns significantly.

C. The Circuit Court Opinion Is Supported by the Decisions of This Court Construing the 1899 Rivers and Harbors Act.

This Court has long recognized, contrary to the assertions of petitioners, that state water projects are subject to the prohibitions of Section 10. *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899). In *Rio Grande* a water diversion authorized by New Mexico was found to require federal approval since the power of a state to allocate the waters of a stream within its boundaries was subject to the superior power of the federal government under Section 10 of the 1890 Act "to take all needed measures to preserve the navigability of the navigable water courses of the country . . . ." 174 U.S. at 703. This Court pointed out that after the 1890 Act: "it is obvious that Congress meant that . . . no State should interfere with the navigability of a stream without the condition of national assent." *Id.* at 708. Even the appropriation of the waters of a non-navigable stream "by the State of New York for domestic uses" would run afoul of the statute, this Court noted, if that appropriation impaired the navigability of a navigable stream. *Id.* at 709. This contemporaneous explication of Congress' intent to apply Section 10 of the 1890 Act to state water projects strongly supports the Circuit Court's holding, and should be afforded great weight in assessing Congress' intentions when it reenacted Section 10 of the 1890 Act in clause one of Section 10 of the 1899 Act.

In *Sanitary District of Chicago* v. *United States*, 266 U.S. 405 (1925), this Court, in requiring a Corps permit for a state water project, again contrasted the superior federal power to protect the nation's waterways, as exercised in the 1899 Act, with the subordinate authority of the states to allocate those waters to their own uses:

> This is not a controversy between equals. The United States is asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction.
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> * * * *
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> The main ground is the authority of the United States to remove obstructions to interstate and foreign commerce. There is no question that this power is superior to that of the States to provide for the welfare or necessities of their inhabitants.

266 U.S. at 425-426. *Accord, Wisconsin* v. *Illinois, supra.*

In none of the cases cited above did this Court even intimate that state water allocation projects were exempt from the provisions of Section 10, but instead in each case this Court applied Section 10 to state-authorized allocations of water serving admittedly important state interests. The petitioners cite no judicial authority under Section 10 which contradicts this unbroken line of cases recognizing federal jurisdiction over state projects.

D. The Circuit Court's Interpretation of Section 10 Effectuates Congress' Intention that All Activities Affecting Federal Interests in the Nation's Waterways Be Subject to Federal Control.

The Corps is charged in Section 10 with the responsibility of determining whether proposed structures or activities enumerated in the second and third clauses of that section impact adversely on federal interests to such an extent that a federal permit should be denied. When, as here, the proposed activity falls within the terms of clause three and federal jurisdiction attaches, the Corps is obligated to balance any potentially adverse effects on national interests against the benefits expected from the proposed project. 33 C.F.R. § 320.4(a)(1). In the case of a state water project, if the permit is granted and the project goes forward, then the state—and not the Corps—retains control to distribute approved volumes of water among competing interests in such proportions as state authorities deem advisable. Thus, through Section 10 and

the Corps permitting authority, Congress has created a system whereby the states are free to manage the distribution and use of their internal waters once it is shown that national interests of overriding importance will not be impaired.

Contrary to petitioners' exaggerated claims of undue federal interference in state matters, the so-called "veto power" of the Corps over state water projects under Section 10 arises only if the Corps properly determines that proposed diversions of water over which it has jurisdiction *unreasonably* interfere with the various federal interests the Corps is charged by Congress to protect. Such permitting decisions by the Corps are subject to judicial review, and may be set aside pursuant to 5 U.S.C. § 706(2)(A) if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971); *DiVosta Rentals, Inc.* v. *Lee*, 488 F.2d 674, 678 (5th Cir. 1973), *cert. denied*, 416 U.S. 984 (1974). Thus, petitioners' arguments about the critical importance of water allocations in the arid West do not bear on the Corps' jurisdiction over state water diversion projects, but are relevant instead to whether the benefits of these projects tip the scale decidedly in favor of approval of the permit application.[21] While petitioners would have this Court strike that balance irrevocably in favor of state projects, the Circuit Court's decision upholding federal jurisdiction over the Delta pumping plant commits the initial evaluation of those factors to the appropriate forum—the Corps. *See* 21 CONG. REC. 8602-04 (1890). Any permit decision by the Corps with which petitioners disagree is subject to judicial review.

California's alternate theory that Corps approval of state water projects is required only if they create a sub-

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[21] In this respect, the Corps' regulations acknowledge the substantial public benefits ordinarily attaching to projects that have received the approval of responsible state authorities. *See* 33 C.F.R. § 320.4(j)(4).

stantial interference with actual navigation again confuses the jurisdictional question of whether a Corps permit must be sought with the substantive question of whether a permit should be issued. If there is some threshold level of state-initiated navigational interference below which federal approval is unnecessary, California's theory offers no clue as to how or by whom it is to be determined whether that threshold has been crossed in a particular case. Adoption of this theory would also eliminate any exercise of discretion by the Corps, for any state water diversion project that required Corps approval would by definition involve a substantial interference with navigation and be deniable on that basis alone. Thus, the only state projects to which the Corps should give its approval would be those over which it has no jurisdiction, and the only state projects over which it would have jurisdiction would be those it should not approve. Congress could hardly have intended such a self-defeating means of protecting the nation's waterways.

The Delta plant's pumping operations at issue here in fact affect the "navigable capacity" of the Sacramento-San Joaquin Delta as California now concedes, California Brief at 53, the District Court found, and the Circuit Court determined, citing the "convincing factual evidence" relied on by the District Court. 610 F.2d at 594. The Circuit Court properly held, however, that clause three of Section 10 applies to all activities which alter or modify a navigable waterway whether or not the activity adversely affects navigation or navigable capacity. This Court need not review this aspect of the Ninth Circuit's opinion in order to affirm the judgment below since petitioners acknowledge that the Delta plant has some impact on the Delta's navigable capacity. Petitioners mistakenly argue, however, that evidence of a significant impact on navigation is a prerequisite to the Corps' jurisdiction under clause three of Section 10. If it addresses this issue, this Court should reject this contention because it

is inconsistent with the plain language of clause three and the prior decisions of this Court.

In *United States* v. *Republic Steel Corp.*, *supra*, this Court examined the broad reach of Section 10 and the independence of its three clauses and observed that some structures to which clause two applies "may only deter movements in commerce, falling short of adversely affecting navigable capacity" within the meaning of the first clause. 362 U.S. at 486-487. It follows inescapably that the proscribed alterations or modifications of the third clause are equally independent of the requirement of clause one that navigable capacity be impaired. In fact in *Sanitary District of Chicago* v. *United States*, *supra*, this Court held Corps approval to be a prerequisite to diversions of water from Lake Michigan without making or relying upon a factual determination as to the effects of the diversions on navigable capacity. 266 U.S. at 426, 429. *See also Wisconsin* v. *Illinois*, *supra*, 278 U.S. at 413 ("the broad words of the first clause [of Section 10] ... were not intended to limit the second and third clauses").[22]

The lowering of Delta water levels here, like the lowering of navigable waters in *Sanitary District*, altered or modified the condition and capacity of a navigable waterway and therefore required prior Corps approval regardless of the effect on the Delta's navigable capacity. In clause three Congress declared that all modifications or

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[22] Petitioners mistakenly argue that this Court's decision in United States v. Rio Grande Dam & Irrigation Co., *supra*, requires a contrary reading of clause three of § 10. *Rio Grande* involved injunctive proceedings brought by the Attorney General under what is now clause one of § 10. The issuance of injunctive relief *under that clause* was limited to appropriations of water which "substantially interfer[e]" with navigable capacity. 174 U.S. at 709. The Corps' jurisdiction under clauses two and three is not subject to a similar limitation, however, as those clauses are directed at federal concerns extending well beyond navigation.

alterations to our nation's waterways [23] present a potential danger to the various national interests Congress sought to protect in Section 10 [24] and hence require a Corps permit whether or not they happen to threaten nagivation in particular.[25] Congress did not envision, as petitioners would suggest, that the Corps' jurisdiction would hinge on a two-step analysis, determining first

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[23] Of course, § 10 must be read as incorporating a *de minimus* standard. Indeed, the Corps' regulations provide that certain activities having only the slightest effects on navigable waters do not require permits. *See* 33 C.F.R. § 322.4. Obviously, however, the lowered water levels and flow reversals caused by the Delta plant's massive pumping operations do not fall within such a *de minimus* rule.

[24] In addition to such historic federal concerns as navigation and flood control, Congress in recent years has expressly required that the Corps consider environmental interests as well in making permit decisions under § 10. *See, e.g.*, National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347; Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666(c). In fact, environmental interests are to be given equal weight with other federal concerns. *See* S. REP. No. 1981, 85th Cong., 2d Sess., *reprinted in* [1958] U.S. CODE CONG. & ADMIN. NEWS 3446, 3450. *See also* National Environmental Policy Act of 1969, § 102(1), 42 U.S.C. § 4332(1). Thus, in making a permit decision under § 10 the Corps must evaluate the impact of the proposed project on: "conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production, and, in general, the needs and welfare of the people." 33 C.F.R. § 320.4(a)(1). *See also* 33 C.F.R. § 322.5(g)(1).

[25] California's reliance on Maine Water Co. v. Knickerbocker Steam Towage Co., 99 Me. 473, 59 A. 953 (1905), in this regard is misplaced. California Brief at 54-57. That case held that clauses two and three of § 10 qualify the first clause only in the sense that obstructions to navigable capacity which receive Corps approval can be erected without meeting the additional precondition of congressional authorization. The Maine court's holding and this Court's adoption of it in Wisconsin v. Illinois, *supra*, 278 U.S. at 412-413, do not limit the operation of clauses two and three to the "obstructions" prohibited by the first clause.

whether a proposed alteration or modification would create an obstruction, and only then whether the obstruction would be unreasonable.

Lower federal courts have correctly held that Section 10 requires a Corps permit for alterations or modifications of navigable waters adversely affecting the environment, and have approved the rejection of permit applications by the Corps on strictly environmental grounds.[26] As the Circuit Court noted, 610 F.2d at 597 n.25, it need not be decided in this case whether the significant environmental effects of the Delta plant's operation alone trigger the need for a permit under Section 10 since the reduced water levels and flow reversals created by the Delta pumping plant do impact adversely on navigable capacity. Nevertheless, the Fifth Circuit decisions noted above and the Corps' duty as mandated by Congress to protect the environment in and around our nation's navigable waters illustrate why Section 10 should be applied literally to projects, like the Delta pumping plant, which may adversely affect federal environmental interests even more than they adversely affect federal navigation interests. If Section 10 were construed otherwise, as petitioners urge,[27] the Corps

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[26] *See, e.g.*, United States v. Joseph G. Moretti, Inc., 526 F.2d 1306, 1310 (5th Cir. 1976); United States v. Sexton Cove Estates, Inc., *supra*, 526 F.2d at 1298-99; Weiszmann v. District Engineer, U.S. Army Corps of Engineers, 526 F.2d 1302, 1304-05 (5th Cir. 1976); Zabel v. Tabb, 430 F.2d 199, 203-204 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

[27] The tortured definition of the "condition or capacity of the *channel*" of navigable water offered by the Water Agencies, Water Agency Brief at 41, defies both reason and common sense. In their view, a three-foot reduction in the depth of a stream is prohibited by § 10 if it is caused by elevating the bed of the stream, but is not prohibited if caused by the removal of some of the stream's water even though both activities obviously affect the condition and capacity of a navigable waterway in a similar way.

might well find itself powerless to prevent a state water project which had disastrous environmental consequences from the federal point of view, but which had only marginal effects on navigation.

CONCLUSION

For all of the foregoing reasons, the judgment and opinion of the Circuit Court should be affirmed.

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